

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF TEXAS
SHERMAN DIVISION

JEREMY DANIEL WICKER, #1732768

VS.

DIRECTOR, TDCJ-CID

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CIVIL ACTION NO. 4:15cv65

REPORT AND RECOMMENDATION
OF UNITED STATES MAGISTRATE JUDGE

Petitioner Jeremy Daniel Wicker, an inmate confined in the Texas prison system, proceeding *pro se*, filed this petition for writ of habeas corpus pursuant to 28 U.S.C. § 2254. The petition was referred to the undersigned United States Magistrate Judge for findings of fact, conclusions of law, and recommendations for the disposition of the case pursuant to 28 U.S.C. § 636 and the Amended Order for the Adoption of Local Rules for the Assignment of Duties to the United States Magistrate Judge.

BACKGROUND

Petitioner is challenging his Denton County conviction for criminal solicitation of a minor, Cause No. F-2009-1068-E. He states that, on January 14, 2011, after pleading guilty to the charge, the court sentenced him to ten (10) years' confinement. The Second Court of Appeals affirmed his conviction and sentence on February 23, 2012. The Texas Court of Criminal Appeals (CCA) refused his petition for discretionary review on July 24, 2012. On July 9, 2013, Petitioner filed a state post-conviction writ of habeas corpus, which was denied without written order on August 14, 2013.

The present petition for a writ of habeas corpus was filed on January 26, 2015. Petitioner alleged that he is entitled to relief because the trial court abused its discretion by failing to inquire into his competency, his plea is constitutionally invalid, and his counsel was ineffective. The Director was not ordered to file a Response.

ANTITERRORISM AND EFFECTIVE DEATH PENALTY ACT OF 1996

On April 24, 1996, the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA) was signed into law. The law made several changes to the federal habeas corpus statutes, including the addition of a one year statute of limitations. 28 U.S.C. § 2244(d)(1). The AEDPA provides that the one year limitations period shall run from the latest of four possible situations: the date a judgment becomes final by the conclusion of direct review or the expiration of the time for seeking such review; the date an impediment to filing created by the State is removed; the date in which a constitutional right has been initially recognized by the Supreme Court and made retroactively applicable to cases on collateral review; or the date on which the factual predicate of the claim or claims presented could have been discovered through the exercise of due diligence. *Id.* at § 2244(d)(1)(A)-(D). The AEDPA also provides that the time during which a properly filed application for State post-conviction or other collateral review with respect to the pertinent judgment or claim is pending shall not be counted toward any period of limitation. *Id.* at 2244(d)(2).¹

In the present case, Petitioner is challenging his conviction. The appropriate limitations provision is § 2244(d)(1)(A), which states that the statute of limitations started running when the conviction became final. The CCA refused his petition for discretionary review on July 24, 2012. He did not file a petition for a writ of certiorari. In interpreting § 2244(d)(1)(A) in light of Supreme Court rules, the Fifth Circuit concluded that a state conviction “becomes final upon direct review, which occurs upon denial of certiorari by the Supreme Court or expiration of the period for seeking certiorari.” *Ott v. Johnson*, 192 F.3d 510, 513 (5th Cir. 1999). Under Rule 13.1 of the Supreme Court Rules, Petitioner had ninety days from the refusal of his petition for discretionary review to file a petition for a writ of certiorari. *See Caspari v. Bohlen*, 510 U.S.

¹ The Fifth Circuit discussed the approach that should be taken in applying the AEDPA one year statute of limitations in *Flanagan v. Johnson*, 154 F.3d 196 (5th Cir. 1998) and *Fields v. Johnson*, 159 F.3d 914 (5th Cir. 1998).

383, 390, 114 S. Ct. 948, 953, 127 L. Ed.2d 236 (1994). The CCA refused his petition for discretionary review on July 24, 2012; thus, his conviction became final ninety days later on October 22, 2012. Accordingly, the present petition was due no later than October 22, 2013, in the absence of tolling provisions. It was not filed until January 26, 2015.

The provisions of 28 U.S.C. § 2244(d)(2) provide that the time during which a properly filed application for state post-conviction or other collateral review is pending shall not be counted toward any period of limitation. Petitioner filed an application for a state writ of habeas corpus on July 9, 2013, which the CCA denied without written order on August 14, 2013. His state writ was pending for 36 days; thus, the statute of limitations was tolled for 36 days, extending the deadline for filing the present federal petition from October 22, 2013, to November 27, 2013. Petitioner filed his petition on January 26, 2015 -- fourteen months beyond the limitations period.

Petitioner has not shown that any other statutory tolling provision applies. The United States Supreme Court recently confirmed that the AEDPA statute of limitation is not a jurisdictional bar, and it is subject to equitable tolling. *Holland v. Florida*, 560 U.S. —, 130 S. Ct. 2549, 2560, 177 L. Ed.2d 130 (2010). “A habeas petitioner is entitled to equitable tolling only if he shows ‘(1) that he has been pursuing his rights diligently, and (2) that some extraordinary circumstance stood in his way’ and prevented timely filing.” *Mathis v. Thaler*, 616 F.3d 461, 474 (5th Cir. 2010) (quoting *Holland*, 130 S. Ct. at 2562). “Courts must consider the individual facts and circumstances of each case in determining whether equitable tolling is appropriate.” *Alexander v. Cockrell*, 294 F.3d 626, 629 (5th Cir. 2002). The petitioner bears the burden of proving that he is entitled to equitable tolling. *Phillips v. Donnelly*, 216 F.3d 508, 511 (5th Cir. 2000).

The Fifth Circuit has held that the district court has the power to equitably toll the limitations period in “extraordinary circumstances.” *Cantu-Tzin v. Johnson*, 162 F.3d 295, 299

(5th Cir.1998). In order to qualify for such equitable tolling, the petitioner must present “rare and exceptional circumstances.” *Davis v. Johnson*, 158 F.3d 806, 810-11 (5th Cir.1998). In making this determination, it should be noted that the Fifth Circuit has expressly held that proceeding *pro se*, illiteracy, deafness, lack of legal training, unfamiliarity with the legal process, and claims of actual innocence are insufficient reasons to equitably toll the statute of limitations. *Felder v. Johnson*, 204 F.3d 168, 173 (5th Cir.2000).

As a general rule, equitable tolling has historically been limited to situations where the petitioner “has actively pursued his judicial remedies by filing a defective proceeding during the statutory period, or where the [petitioner] has been induced or tricked by his adversary's misconduct into allowing the filing deadline to pass.” *Irwin v. Dep’t of Veterans Affairs*, 498 U.S. 89, 96, 111 S. Ct. 453, 457-58, 112 L. Ed.2d 435 (1990). Furthermore, equitable tolling cannot be used to thwart the intent of Congress in enacting the limitations period. *See Davis*, 158 F.3d at 811 (noting that “rare and exceptional circumstances” are required). At the same time, the court is aware that dismissal of a first federal habeas petition is a “particularly serious matter, for that dismissal denies the petitioner the protections of the Great Writ entirely, risking injury to an important interest in human liberty.” *Lonchar v. Thomas*, 517 U.S. 314, 324, 116 S. Ct. 1293, 1299, 134 L. Ed.2d 440 (1996).

Petitioner asserts that he is entitled to equitable tolling because his mental illness prevented him from timely filing his petition for writ of habeas corpus. The Fifth Circuit has recognized the remote possibility that mental incapacity may provide a basis for equitable tolling. *See Fisher v. Johnson*, 174 F.3d 710, 713 (5th Cir. 1999). However, Petitioner has failed to provide any evidence of his mental incapacity. Conclusory allegations are insufficient to entitle a habeas corpus petitioner to relief. *United States v. Woods*, 870 F.2d 285, 288 (5th Cir. 1989); *Schlang v. Heard*, 691 F.2d 796, 799 (5th Cir. 1982). Federal courts do not “consider a habeas petitioner’s bald assertions on a critical issue in his *pro se* petition . . . mere

conclusory allegations do not raise a constitutional issue in a habeas proceeding.” *Smallwood v. Johnson*, 73 F.3d 1343, 1351 (5th Cir. 1996) (quoting *Ross v. Estelle*, 694 F.2d 1008, 1011-12 (5th Cir. 1983)).

This court concludes that Petitioner has failed to provide sufficient support of his contention that his mental condition impaired his ability to file his federal habeas petition within the one-year limitations period. *See Flanagan v. Johnson*, 154 F.3d 196, 200-02 (5th Cir. 1998). He failed to present any evidence at all that his mental condition rendered him incompetent to timely file his federal habeas petition. *See Hennington v. Johnson*, No. 4-00-CV-0292-A, 2001 WL 210405 at *2 (N.D. Tex. Feb. 28, 2001), COA denied, No. 01-10395 (5th Cir. Aug 23, 2001) (conclusory assertions of mental illness insufficient to justify equitable tolling of limitations period). Equitable tolling will not be granted if the petitioner failed to diligently pursue his rights. *Larry v. Dretke*, 361 F.3d 890, 897 (5th Cir. 2004).

Likewise, he has not shown any rare and exceptional circumstances that would demonstrate entitlement to equitable tolling. *United States v. Riggs*, 314 F.3d 796, 799 (5th Cir. 2002). In order to qualify for such equitable tolling, the petition must present “rare and exceptional circumstances.” *Davis v. Johnson*, 158 F.3d 806, 810-11 (5th Cir.1998). In making this determination, it should be noted that the Fifth Circuit has expressly held that proceeding *pro se*, illiteracy, deafness, lack of legal training, unfamiliarity with the legal process, and claims of actual innocence are insufficient reasons to equitably toll the statute of limitations. *Felder v. Johnson*, 204 F.3d 168, 173 (5th Cir.2000).

Petitioner has not shown “rare and exceptional circumstances” for extending the commencement of the statute of limitations. His comment that he had just recently learned of the writ of habeas corpus is not sufficient to warrant equitable tolling. *See Turner v. Johnson*, 177 F.3d 390, 392 (5th Cir. 1999) (Unfamiliarity with legal process, illiteracy, and lack of representation do not merit equitable tolling). Consequently, the federal petition, filed fourteen months beyond the statutory deadline, is time-barred.

CERTIFICATE OF APPEALABILITY

An appeal may not be taken to the court of appeals from a final order in a habeas corpus proceeding “unless a circuit justice or judge issues a certificate of appealability.” 28 U.S.C. § 2253(c)(1)(A). Although Petitioner has not yet filed a notice of appeal, it is respectfully recommended that this court, nonetheless, address whether he would be entitled to a certificate of appealability. *See Alexander v. Johnson*, 211 F.3d 895, 898 (5th Cir. 2000) (A district court may *sua sponte* rule on a certificate of appealability because “the district court that denies a petitioner relief is in the best position to determine whether the petitioner has made a substantial showing of a denial of a constitutional right on the issues before the court. Further briefing and argument on the very issues the court has just ruled on would be repetitious.”).

A certificate of appealability may issue only if a petitioner has made a substantial showing of the denial of a constitutional right. 28 U.S.C. § 2253(c)(2). The Supreme Court fully explained the requirement associated with a “substantial showing of the denial of a constitutional right” in *Slack v. McDaniel*, 529 U.S. 473, 484, 120 S. Ct. 1595, 1603-04, 146 L. Ed.2d 542 (2000). In cases where a district court rejected a petitioner’s constitutional claims on the merits, “the petitioner must demonstrate that reasonable jurists would find the district court’s assessment of the constitutional claims debatable or wrong.” *Id.*; *Henry v. Cockrell*, 327 F.3d 429, 431 (5th Cir. 2003). “When a district court denies a habeas petition on procedural grounds without reaching the petitioner’s underlying constitutional claim, a [certificate of appealability] should issue when the petitioner shows, at least, that jurists of reason would find it debatable whether the petition states a valid claim of the denial of a constitutional right and that jurists of reason would find it debatable whether the district court was correct in its procedural ruling.” *Id.*

In this case, it is respectfully recommended that reasonable jurists could not debate the denial of Petitioner’s § 2254 petition on procedural grounds, nor find that the issues presented

are adequate to deserve encouragement to proceed. *Miller-El v. Cockrell*, 537 U.S. 322, 336-37, 123 S. Ct. 1029, 1039, 154 L. Ed.2d 931 (2003) (citing *Slack*, 529 U.S. at 484, 120 S. Ct. at 1604). Accordingly, it is respectfully recommended that the court find that Petitioner is not entitled to a certificate of appealability as to the claims raised.

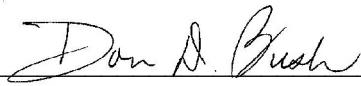
RECOMMENDATION

It is accordingly recommended that the above-styled petition for writ of habeas corpus be denied and the case be dismissed with prejudice. It is further recommended that a certificate of appealability be denied.

Within fourteen (14) days after service of the magistrate judge's report, any party must serve and file specific written objections to the findings and recommendations of the magistrate judge. 28 U.S.C. § 636(b)(1)(C). In order to be specific, an objection must identify the specific finding or recommendation to which objection is made, state the basis for the objection, and specify the place in the magistrate judge's report and recommendation where the disputed determination is found. An objection that merely incorporates by reference or refers to the briefing before the magistrate judge is not specific.

Failure to file specific, written objections will bar the party from appealing the unobjected-to factual findings and legal conclusions of the magistrate judge that are accepted by the district court, except upon grounds of plain error, provided that the party has been served with notice that such consequences will result from a failure to object. *See Douglass v. United Servs. Auto. Ass'n*, 79 F.3d 1415, 1430 (5th Cir. 1996) (*en banc*), *superceded by statute on other grounds*, 28 U.S.C. § 636(b)(1) (extending the time to file objections from ten to fourteen days).

SIGNED this 17th day of June, 2015.



DON D. BUSH
UNITED STATES MAGISTRATE JUDGE
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